In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 634.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH,
Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

PETITION FOR REHEARING.

RAYMOND T. JACKSON,
EARL R. LEWIS,
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Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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PETITION FOR REHEARING.

Comes now the above named The Baltimore and Ohio Railroad Company, petitioner, and presents this its petition for a rehearing of its petition for a writ of certiorari in the above entitled cause and in support thereof respectfully shows:

FOREWORD.

Although it may seem an ungracious thing for counsel to seek a rehearing after the Court has denied the petition for writ of certiorari previously filed and presented, the decision of the Circuit Court of Appeals for the Sixth Circuit which the petition for writ of certiorari, denied January 20, 1941, sought to have this Honorable Court review, results in such an incongruous situation and throws such doubt and uncertainty upon the rights and liabilities of petitioner and the duties and responsibilities of passengers in vehicles operating on the highways and across railroad crossings, that counsel for the petitioner feel that in the petition for writ of certiorari they inadequately

presented the issues involved and failed to sufficiently direct this Honorable Court's attention to the principles that should control the determination of those issues and which were overthrown in the instant case, and that it is their duty, as counsel for petitioner, to respectfully ask a reconsideration and rehearing of the matters presented by the petition for writ of certiorari hereinbefore filed.

SPECIFIC REASONS PRESENTED FOR GRANTING THIS PETITION FOR REHEARING.

1. The opinion of the Circuit Court of Appeals for the Sixth Circuit holds that a passenger in a motor vehicle about to cross and in the act of crossing a railroad track, who admittedly was actively undertaking to look and listen for approaching trains and failed to see or hear a train which was in plain sight at a time when the vehicle was still in a place of safety, and which afterwards struck the automobile, which had moved into a place of danger, and injured the passenger, can recover against the railroad company if it was in any way negligent. This obviously seems to be erroneous. If this decision is permitted to stand as a correct exposition of the rules of conduct by which that passenger's and the railroad company's rights are to be determined, it imposes upon the railroad company a far broader and more stringent liability than has heretofore ever been imposed. By the same token, it also relaxes, if it does not completely sweep aside, the standard of care imposed upon a passenger in a vehicle by a long and substantially unbroken line of decisions. It presents a revolutionary change in this broad field. It would permit a passenger to ignore the most obvious dangers with impunity and would impose upon petitioner the extremely onerous burden of becoming a practical insurer of such passenger's safety—a burden as great or greater than that now imposed upon a railroad in carrying passengers for hire.

The Circuit Court of Appeals found it this case that the passenger in the vehicle was actively purporting to look and listen for an approaching train; that she was under a duty to look and listen and warn the driver of any train's approach; that had she looked as required by law, she must have seen the train which was in plain sight; that she did not see or hear it before the automobile started across the crossing; and that the collision occurred about two seconds after the automobile started to move across the tracks. There was undisputed evidence in the record that the passenger did not see the train until the automobile had entered a place of danger and the engine was so close that the accident was inevitable. These facts all appeared in the plaintiff's case in chief. But in the face of all these findings of the Court and this evidence, the Court upheld a recovery for the passenger and held that the matter should have been submitted to the jury on the issue of the plaintiff's contributory negligence and on a charge embodying the doctrine of "last clear chance." That, we respectfully submit, is patently erroneous.

2. The decision of the Circuit Court of Appeals for the Sixth Circuit manifestly fails to follow and apply several applicable principles of law decided by the courts of the State of Ohio and by this Court. We will not burden the Court with any extended argument respecting the numerous legal principles that were ignored in the instant decision but respectfully refer the Court to the argument contained in our brief in support of the petition for writ of certiorari at pages 13 *et seq.*, and to the statement of the reasons relied upon for the allowance of the writ stated at pages 6 and 7 of the petition for writ of certiorari as follows:

> "The Circuit Court of Appeals for the Sixth Circuit failed to follow and apply the applicable law of the State of Ohio as it was bound to do under the decisions of this Court, to wit, *Erie Railroad Co. v. Tompkins,*

304 U. S. 64; *West et al. v. Am. Tel. and Tel. Co.*, U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, decided Dec. 9, 1940. The Ohio cases clearly define the duty of a traveler in a vehicle at a railroad crossing. *Detroit, Toledo & Ironton R. R. Co. v. Rohrs*, 114 O. S. 493, 502, and *Lang, Admx. v. Pennsylvania Railroad Co.*, 59 O. App. 345. The duty of a passenger in a vehicle at a railway crossing is likewise clearly defined in *Hocking Valley Railway Co. v. Wykle*, 122 O. S. 391, 395.

"The Circuit Court of Appeals also failed to follow and apply applicable decisions of the Supreme Court of Ohio specifically holding that the court should direct a verdict for defendant when plaintiff's own evidence discloses negligence on his part directly contributing to his injury, or where evidence offered on plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, to wit, *Cleveland Railway Co. v. Wendt*, 120 O. S. 197, 203-4; and failed to follow and apply decisions of this Court and of the Supreme Court of Ohio specifically holding that 'last clear chance' has no application where the negligence of the parties is substantially concurrent, and that 'last clear chance' can only apply when the defendant actually became aware of the plaintiff's perilous position and thereafter failed to exercise ordinary care to avoid injuring him, to wit, *St. L. Southwestern Ry. Co. v. Simpson, Adm.*, 286 U. S. 346, *Cleveland Railway Co. v. Masterson*, 126 O. S. 42, and *Brock v. Marlatt, Admx.*, 128 O. S. 435, 439. The Circuit Court of Appeals likewise failed to follow and apply the well established law of the State of Ohio that a beneficiary, who, by his negligence, contributed to the death of the decedent, is not entitled to recover any damages by reason of decedent's wrongful death, to wit, *Wolf, Admr. v. Lake Erie and Western Ry. Co.*, 55 O. S. 517.

"These are all important questions of the local law of Ohio and the decision is manifestly in conflict with such decisions, and is likewise manifestly in conflict with decisions of this Honorable Court."

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the petition

for writ of certiorari be reconsidered, and upon such reconsideration thereof, that the petitioner may have the relief therein prayed for.

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We hereby certify that the foregoing petition is presented in good faith and not for delay.

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